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United States Second Circuit Court of Appeals
ATTN: Honorable Judges Chin, Katzmann, and Parker
40 Foley Square
New York, NY 10007

March 17, 2016

RE: *NFL v. Tom Brady*
Docket No. 15-2801

Dear Judges Chin, Katzmann, and Parker:

In their brief and at oral argument the NFL made several material misstatements of fact that could mislead this Court in its deliberation. NFL counsel was made aware of at least some of these material misstatements prior to oral argument and yet to the best of my knowledge not only failed to correct them but also made additional factual misstatements.[1] As a former teacher of legal ethics who has submitted the *amicus* brief in *NFL vs. Tom Brady*, I feel obliged to draw this Court's attention to these false statements.

In their brief, the NFL stated:

1. **The Deflator: (NFL Brief p. 11)** "Text messages between Jastremski and McNally also indicated that the two had been deflating game balls at Brady's request long before the AFC Championship Game. In message**S** dating back to May 2014 **and continuing during the 2014-2015 season**, McNally referred to himself as "the deflator" (emphasis added.)

This statement has absolutely no basis in fact. The Wells Report does refer to "deflator" many, many times, but it draws those references from one and only one pre-season text message.[2] This misstatement by the NFL along with others – see attached letter -- could understandably foster an initial impression that the evidence of football deflation was compelling.

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[1] *See* Letter from Daniel L. Goldberg to Paul D. Clement, dated January 26, 2016, attached.

[2] *See, e.g.,* Wells Report p. 6 (referencing May 9th text message); Wells Report p. 13 (referencing May 9th text message); Wells Report p. 14 (presumptively referencing same text message as previous page); Wells Report p. 15 (referencing May 9th text message, but describing it as "messages"); Wells Report p. 16 (presumptively referencing May 9th text message); Wells Report p. 40 n. 20 (referencing "a text message" which is presumptively the May 9th text message); Wells Report p. 75 (referencing May 9th text message); Wells Report p. 123 (referencing May 9th text message, but describing it as "messages"); Wells Report p. 124–25 (referencing May 9th text message); Wells Report p. 126 (presumptively referencing May 9th text message).

2. **Access to the interview notes**: **(NFL Brief p. 16) "Brady's counsel was present for many of the interviews** at which the notes were prepared, including Brady's interview." (emphasis added.)

The NFL uses this false assertion as a primary justification for denying Tom Brady access to the interview notes. In fact, Brady's lawyers were present *only* at Brady's interview. The NFLPA's brief specifically alerted NFL counsel to this untrue statement. (NFLPA Brief p.55 n.11, citing JA119–23). This false assertion can wrongly lead members of this Court to believe that Brady had equal access to the interviews themselves, rendering the notes superfluous and arguably work product. As the *amicus* spells out, the Commissioner must have relied on the interviews in ways not revealed in his report, because otherwise assumptions and findings adverse to Tom Brady are completely ungrounded. These notes, alone, will reveal, most notably, the basis for the NFL Commissioner's highly improbable and almost certainly false conclusion that the half-time sequence did not allow the Colts balls to warm up while the Patriots balls were being re-inflated. The notes will also reveal the grounds, and certainty for concluding that the referee misremembered which of his own two gauges he used 48 times to measure the PSI pre-game, so as to calculate the actual drop in pressure. The *amicus* brief spells out several other vital aspects of the investigation withheld from Brady and relied upon by Exponent and The Wells Report.

Since Brady's counsel was not permitted to be present during the interviews, only the interview notes themselves can entirely rebut the NFL's essential assertion that the Commissioner "reasonably resolved every contested issue." (NFL Brief p. 2.) Denying Brady's counsel the right to attend those interviews – contrary to the brief's assertion – disabled Brady from challenging the basis for the Wells Report and Exponent's finding of probable guilt. The interviews themselves, and denial of access to their content could well move this Court to remand for a full factual, adversarial hearing on whether any balls were ever actually deflated.

3. **Apparent Ball tampering**: "'Eleven of New England's footballs were tested at halftime; all were below the prescribed air pressure range as measured on each of two gauges. Four of Indianapolis's footballs were tested at halftime' as well, and 'all were within the prescribed air pressure range on at least one of the two gauges.'" (NFL brief p. 9.)

In isolation, each of these oft repeated statements does correspond to reality. But they become misleading and deceptive in context when the NFL uses them to support their central claim of *improper* ball deflation.[3] The NFL further enhances the misleading effect of this statement by failing to emphasize that 3 out of 4 Colts balls also measured below the legal minimum on the other gauge – the very gauge whose measurements the Wells Report insisted the referee used.

[3] (See *Amicus* pp.9-10; cf. http://wellsreportcontext.com/ which extensively cites and collects materials exposing scientific fallacies in the Wells report. *Amicus* p.20).

4. NFL Counsel at Oral Argument stated that the Commissioner rightly found Brady's testimony that "we only talked about ball preparation for the Super Bowl" in his post-game conversations with Jastremski as incredible on its face.[4]

The transcript of the appellate hearing before the Commissioner, however, clearly reveals the exact opposite – *i.e.* that Tom Brady repeatedly testified under oath to the Commissioner that his post AFC game conversations included not only discussions of ball preparation but also the pending investigation/allegations of ball deflation.[5]

Conclusion: Duty of Counsel to Correct False Statements

ABA Model Rule 3.3, Candor Toward The Tribunal, declares that "A lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." If a lawyer "has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal."

I am hard put to understand how NFL Counsel in his brief or at Oral argument before this court did not *knowingly* make false statements. In addition to the attached personal communication, recent columns by Sally Jenkins in the Washington Post[6] and Mike McCann in Sports Illustrated[7] have extensively focused on NFL counsel's factual misstatements.

In passing, let me note my own no-longer-true statement in material cited in the *amicus* brief, which included me among those who detest the Patriots. Witnessing the repeated, continuing unjustified abuse and distortion heaped upon the team by the NFL and an un(der)informed public has created in me a deep ambivalence. Thus no longer do I wish for Brady's on-field defeat but this Court should still consider me an honest neutral observer, concerned about the integrity of sport.

Sincerely,

Robert Blecker
Professor of Law

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[4] The quote drawn from my notes of oral argument.
[5] See Brady examination Tr. 76; cf. NFL Counsel Reisner's cross examination of Brady (App Tr. 130; 134)
[6] Sally Jenkins, *NFL Deflated the Truth – and Owes the Court a Correction*, The Washington Post (Mar. 8, 2016), https://www.washingtonpost.com/sports/redskins/nfl-deflated-the-truth--and-owes-the-court-a-correction/2016/03/08/02bcae4e-e540-11e5-b0fd-073d5930a7b7_story.html.
[7] Mike McCann, *New Hope for Tom Brady? Rethinking the Deflategate Appeal*, Sports Illustrated (Mar. 8, 2016), http://www.si.com/nfl/2016/03/08/tom-brady-nfl-deflategate-appeal-suspension-paul-clement.

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January 26, 2016

PERSONAL & CONFIDENTIAL

VIA FEDEX

Paul D. Clement, Esq.
Bancroft PLLC
500 New Jersey Avenue, N.W.
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Washington, D.C. 20001

Re: National Football League Management Council v. National Football League Players Association and Tom Brady

Dear Mr. Clement:

I am writing to you on a matter of significant importance because I believe that you have been ill-served by those who assisted you in drafting the brief to the Second Circuit on behalf of the National Football League Management Council ("NFL"). I am confident that you would not knowingly sign your name to a brief that contained significant misstatements of the record. I am writing to call your attention to some of the misstatements, knowing that you, as an attorney of unquestioned integrity, will want to take such actions as are appropriate in the circumstances.

In connection with the League's decision not to turn over the Paul Weiss interview notes, the NFL brief quotes the Commissioner's statement: "Brady's counsel was present for many of the interviews [by Paul Weiss] at which the notes were prepared." In fact, Mr. Brady's counsel, Messrs. Yee and Dubin, were only allowed by Paul Weiss to be present for Mr. Brady's interview. Mr. Brady was separately represented from the Patriots, as was recognized on numerous occasions by the Paul Weiss lawyers, who communicated directly with Mr. Brady's counsel on matters such as his telephone records. Such direct communications, which explicitly acknowledge Messrs. Yee and Dubin as Mr. Brady's personal counsel, are part of the record. Even the Patriots counsel, despite repeated requests to Paul Weiss, were not allowed to be present at any interviews of League personnel. The NFLPA did not have a lawyer present at any interviews except for the Paul Weiss interview of Stephen Gostkowski. In short, the representation to the Second Circuit -- that Mr. Brady's counsel was present for many of the Paul Weiss

interviews -- misstates the record.

The NFL's brief also contains numerous material misstatements about the texts between Messrs. McNally and Jastremski. For example, at page 11, the brief states: "In messages dating back to May 2014 and continuing during the 2014-15 Season, McNally referred to himself as "the deflator". In fact, as reflected in the Wells Report itself, the term was used only once, in a single text in May 2014.

Also in page 11, the brief states: "McNally often asked Jastremski to convey to Brady his demands for items of value (e.g., "cash and new kicks")." In fact, not a single text or other record evidence has McNally asking Jastremski to convey any "demands" to anyone, let alone to Mr. Brady. There are a number of other misstatements about the content of the texts, which are set forth verbatim in the Wells Report.

Another misstatement appears at page 50 of the brief: "Wells testified that Pash had provided minor comments on the draft of the Wells Report." Any fair reading of Mr. Wells' testimony before the Commissioner was that he did not know the content of Mr. Pash's comments, assumed they were in the nature of wordsmithing, and raised privilege issues on further details.

Another misstatement appears at page 12: ". . . in 2006 he [Brady] specifically discussed inflation levels when he was personally involved in successful effort to change League rules to allow each team to prepare its own game balls." There is, simply, no evidence of Brady "specifically discussing inflation levels" in connection with the change in the League rules -- and the evidence, in fact, is that inflation levels were not part of the rationale (or the quarterback petition, introduced into evidence) for the rule.

I am sure you will diligently review these matters. Even a single misrepresentation of the record evidence is something I know you would not countenance.

Sincerely,

Daniel L. Goldberg

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

NFL Mgmt. Council

v.

NFL Players Association and
Tom Brady

Certificate of Service

Docket No. 15 –2801

I, Robert Blecker, hereby certify under penalty of perjury that on Thursday, March 17, 2016, I served a copy of a letter to this Court correcting misstatements of fact, by E-mail, on the parties listed in the attached. I also certify that on March 21, 2016 two hard copies of the same were sent via first-class U.S. mail to Michelle McGuirk at the following address provided for that purpose: Michelle McGuirk P.O. Box 369, New York NY 10113.

3/21/2016
Today's Date

Signature

LIST OF ATTORNEYS

Dear Sir or Madam:

A copy of the enclosed Letter to the Court has been served on each of the following attorneys, via e-mail, as indicated below.

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